Supreme Court, U.S.
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No. 95-1661

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DOMINIC ROBERT, a minor, by his mother and natural guardian, MARY ANNE ROBERT,

Petitioners,

vs.

PHILADELPHIA PARK, and BENSALEM RACING ASSOCIATION, INC. and KEYSTONE TURF CLUB, INC. and GREENWOOD RACING, INC. and THOROUGHBRED RACING PROTECTIVE BUREAU, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether this Honorable Court may or should review the decision of the Pennsylvania Supreme Court to dismiss, as having been improvidently granted, an appeal from the order of the Pennsylvania Superior Court quashing, as having been taken from a currently unappealable order, an appeal from the interlocutory order of the trial court, which regulated the parties' discovery by temporarily prohibiting the petitioners' attorneys from disclosing to their clients the name of the confidential informant whose information led to the petitioners' arrest.

LIST OF PARTIES

Petitioners in this action are Dominic Robert, a minor, by his mother and natural guardian, Mary Anne Robert. Respondents in this action are Philadelphia Park and Bensalem Racing Association, Inc. and Keystone Turf Club, Inc. and Greenwood Racing, Inc. and Thoroughbred Racing Protective Bureau, Inc.

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No. 95-1661

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DOMINIC ROBERT, a minor, by his mother and natural guardian, MARY ANNE ROBERT,
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v.

PHILADELPHIA PARK, and BENSALEM RACING ASSOCIATION, INC. and KEYSTONE TURF CLUB, INC. and GREENWOOD RACING, INC. and THOROUGHBRED RACING PROTECTIVE BUREAU, INC.,
Respondents

On Petition for Writ of Certiorari
to the Supreme Court of Pennsylvania

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

Petitioners have invoked the jurisdiction of this Honorable Court pursuant to 28 U.S.C. 1257.

Respondents respectfully suggest that the jurisdiction provided to this Honorable Court under Article III of the Constitution and 28 U.S.C. 1257 does not obtain in this case. The trial court's discovery-related order which petitioners attempt to present to this Honorable Court is not a final or appealable interlocutory order. The orders of the Pennsylvania Superior Court and the Pennsylvania Supreme Court, although final, do not

address the merits of the trial court's order. Rather, the Superior Court's order simply holds that the trial court's order is not currently appealable, and the Supreme Court's order simply dismisses, as having been improvidently granted, the appeal allowed from the Superior Court's decision to quash the petitioner's premature appeal.

Petitioners originally filed a petition for certiorari which was rejected by this Honorable Court as failing to conform to the rules. Petitioners subsequently refiled what they posit as a conforming Petition for Certiorari.

CONSTITUTIONAL PROVISIONS

Respondents deny that any constitutional question is presented by this case.

COUNTERSTATEMENT OF THE CASE

This case arises out of an incident which occurred at the Philadelphia Park racetrack on June 6, 1991. Plaintiff-petitioner Maryanne Robert [hereinafter collectively referred to with her son, plaintiff-petitioner Dominic Robert, as "the Roberts"] maintains that on that day Philadelphia Park security personnel conducted a search of her person and her vehicle in such a manner to cause her and her son to suffer emotional and physical injuries. The Roberts allege that the search was prompted by information furnished to the security personnel by a confidential informant.

The Roberts filed suit against defendants Philadelphia Park and Bensalem Racing Association, Inc., and Keystone Turf Club, Inc. and Greenwood Racing, Inc. and Thoroughbred Racing Protective Bureau, Inc.

[hereinafter known as "the Park"] in the Court of Common Pleas of Bucks County.

The Roberts subsequently served interrogatories on the Park on May 29, 1993. The Park responded by serving objections to an interrogatory which sought the identity of the confidential informant. The trial court entered an order directing the Park to serve complete answers, and the Park filed a motion for reconsideration on August 27, 1993. In connection with this motion, the trial judge arranged a hearing for October 19, 1993. Counsel for both parties were heard on the issues of when and under what circumstances the identity of the informant could be released.

By order of November 3, 1993, the trial court determined that the confidential informant would be identified "in camera" and any testimony would be taken in the presence of the court. The confidential informant was ordered to appear before Judge Clark in chambers to be deposed on November 23, 1993.

The Roberts subsequently subpoenaed an individual they suspected was the informant on November 1, 1993 in order to take his deposition on November 19, 1993. In response, the Park filed a motion for a protective order and a stay of proceedings, on November 18, 1993. In this motion, the Park argued that the deposition testimony of plaintiff Roberts' husband, Robert Scetta, indicated that plaintiffs suspected that the individual subpoenaed for November 19 was the informant, and that the plaintiffs' attempt to depose that individual was in derogation of the court's order calling for the informant's deposition in camera on November 23.

A conference was held on November 19 to determine this motion. After counsel for the Park identified the confidential informant at sidebar at the request of the judge, the court issued the order which the petitioners attempt to bring before this Honorable Court. That order provided a schedule for discovery and prohibited The Roberts' counsel from disclosing the identity of the confidential informant to anyone until further order of the court. Contrary to the statement of petitioners that the court ruled without evidence, the record contained the discovery deposition testimony of Mary Anne Robert's boyfriend, Robert Scetta which demonstrated a history of confrontation between the former and the informant predating the incident; thus the Park justifiably feared that The Roberts and Mr. Scetta would attempt to intimidate, confront or otherwise threaten the informant.

The confidential informant was deposed before the trial court on April 19, 1994.

The Roberts thereafter appealed the interlocutory discovery order to the Superior Court of Pennsylvania, which quashed the appeal as having been taken from an order that was not currently appealable. The Roberts then successfully petitioned the Pennsylvania Supreme Court for Allowance of Appeal. However, after briefing and oral argument, the Pennsylvania Supreme Court dismissed the appeal as improvidently granted by order of November 22, 1995. The Roberts' Petition for Certiorari followed.

The Park disagrees that any federal question was ever preserved for review by this or any other Court.

REASONS FOR DENYING THE WRIT

I. THIS HONORABLE COURT DOES NOT HAVE JURISDICTION TO REVIEW THIS CASE: THE ORDER PRESENTED BY THE PETITIONERS IS NOT A FINAL ORDER, BUT AN INTERLOCUTORY DISCOVERY ORDER, AND THE ORDERS OF THE STATE APPELLATE COURTS, ALTHOUGH FINAL, DO NOT PRESENT A RULING ON THE MERITS OF THE TRIAL COURT'S ORDER OR A CONSTITUTIONAL QUESTION

The power of this Honorable Court to review the decisions rendered by state courts is limited.

The interlocutory discovery order which the petitioners seek to present to this Honorable Court does not fall within that limited jurisdiction, because that order is not a "Final judgments or decrees rendered by the highest court of a State" as required by 28 U.S.C. § 1257 (a). The grant or denial of a protective discovery order is deemed interlocutory because it makes no final disposition of the matter in controversy and is therefore not subject to appeal. Mackowain v. Gulf Oil Corp., 369 Pa. 581, 87 A.2d 314 (1952). Orders which preclude the disclosure of information on the grounds of privilege are not appealable under the collateral order doctrine. Steel v. Weisberg, 347 Pa. Super. 106, 500 A.2d 428 (1985).

While the order of the Pennsylvania Supreme Court qualifies under the first clause of Section 1257 (a), that order is not reviewable by this Honorable Court, because that order did not decide the merits of the trial court's

order and, consequently, presents no justiciable or Constitutional issue for this Honorable Court to resolve.

Likewise, for all of these reasons, the order of the Pennsylvania Superior Court, which quashed the petitioners' appeal from the discovery order, does not qualify for this Honorable Court's limited jurisdiction.

II. EVEN IF ITS MERITS ARE REVIEWED, THE ORDER DOES NOT ENCROACH ON FREE SPEECH AS A PRIOR RESTRAINT AND THE REQUIREMENTS FOR CONSTITUTIONAL ENDORSEMENT ENUNCIATED UNDER SEATTLE TIMES V. RHINEHART

Additionally, this temporary, interlocutory gag order issued in pre-trial discovery, which prohibits disclosure of the identity of the confidential informant, and which was obtained after a full hearing on the merits of the request, was open-ended and designed to be temporary. The order left open the opportunity for plaintiff to seek relief during discovery. The Roberts never sought further relief after the order was granted.

The temporary gag order was well within the lower court's jurisdiction and discretion as an order regulating the discovery process. It can be likened to an order sustaining an objection at a deposition, or an objection to an interrogatory.

Even if the merits of the order are reviewed, the order is in no way an encroachment on free speech as a prior restraint. Neither does this order, which meets the requirements for constitutional endorsement enunciated

under Seattle Times v. Rhinehart, 467 U.S. 20, 104 S.Ct. 2119, 81 L. Ed. 2d. 17 (1984), violate the state or federal constitution.

No litigant has an unrestrained right to disseminate information obtained through pre-trial discovery. Here, the trial court's temporary gag order was issued during pre-trial discovery for the good cause of protecting the informant from physical and verbal harassment and does not violate the prohibition against orders which prevent disclosure of information obtained outside of discovery. The order meets every requisite set out by this Court in Seattle Times for a constitutionally valid "gag" order.

In Seattle Times, this Court declared that there is no unfettered right to publish information gathered in this context and protective orders entered under the appropriate circumstances do not offend the First Amendment. Id. at 31. It expressly distinguished orders prohibiting dissemination of discovered information before trial as "not the kind of classic prior restraint that requires exacting First Amendment scrutiny." Id., at 33 (citing Gannett v. Depasqualle, 433 U.S. 368, 399 (1970)(Powell, J., concurring). To the contrary such limitations on a party's ability to disseminate information discovered in advance of trial, implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints in a different context. Id., at 34. This Court was also cognizant of the possibility of exploitation under circumstances which necessarily allow intrusion into the private affairs of litigants and third parties. 467 U.S. at 34-35.

Conscious of these concerns, this Court proscribed that a valid gag or protective order: (1) must be based upon "a showing of good cause"; (2) be "limited to the

context of pre-trial civil discovery"; and, (3) that it "not restrict dissemination of information if gained from other sources." Id., 467 U.S. at 37.

The Park has repeatedly shown "good cause" for the order throughout the course of this discovery dispute by demonstrating that the disclosure of this information would be chaotic to the Philadelphia Park racing community and destructive of the informant's safety, well-being and livelihood, particularly given the nature of the horse racing business and the sensitive nature of the information. Testimony of record does support defendant's assertions: according to the plaintiff's own deposition and the deposition of witness Robert Scetta, there was a history of confrontation between Mr. Scetta and [the confidential informant] predating the subject incident. It was feared plaintiff and her boyfriend, Mr. Scetta would attempt to intimidate, confront or otherwise threaten the informant.

Secondly, Seattle Times requires that orders be limited to the context of pre-trial civil discovery in order to be constitutionally sound. The order, which was issued in the pre-trial phase of this case, and which governed information obtained through interrogatories, the noticing of a deposition and other procedural devices, conclusively met this requirement.

Also, the order merely states that the identity of the confidential informant temporarily may not be disclosed by the attorneys for either party in this case until "further notice" of the court. By its plain terms, and by the context in which it was issued, the order is conspicuously limited to the context of pre-trial discovery and clearly contemplates that further order of the court will review and/or release it at an appropriate time. The Park never

requested, nor did the trial court actually order, an absolute, permanent bar of disclosure of the identity of the information and discovery information therefrom.

Moreover, The Roberts never inquired of the trial court what the duration of the order, objected its perceived duration, suggested a different time period for which the order would be in effect, or have since attempted to have it lifted.

The informant's identity was released to the court and The Roberts' counsel. The deposition was held, and the right to question the informant was in no way impeded. The gag order simply, and temporarily, protected the informant from the very real threat of physical and verbal abuse that would be caused by the release of his name.

Finally, the order meets the third prong of the Seattle Times test. First, the information about the existence and identity of a confidential source was obtained, or at least confirmed through pre-trial discovery. Were The Roberts allowed to disseminate the informant's identity of the confidential informant, simply because they may have previously suspected his identity, the gag order would be toothless.

The Roberts, through their attorney, were given access to the informant for deposition and have the substance of the information that he provided to the track, from the Park' answers to interrogatories. In short, they were given the ability to learn anything relevant about the informant or the information that he provided that they might need to prosecute their case. In fact they were given the opportunity to learn this information from the informant himself, in person, under oath and in the presence of the trial court. Just as in Seattle Times the

protective order here still allows The Roberts to prepare for and try their case without impingement. And, again, even if it did not it is not prior restraint.

The lower court's order amply satisfies the requisites of Seattle Times for a constitutionally valid protective order. Consequently, the lower court's order may be affirmed.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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